

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

7-16  
V. Allowed

ERNEST N. BENJAMIN.  
Petitioner

v.

Civil Action No. 2004-11025-JLT

LUIS SPENCER,  
Respondent.

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PETITIONER'S OPPOSITION TO  
THE RESPONDENT'S MOTION TO DISMISS

Respondent fails to mention that after judge tauro accepted the magistrate's report and recommendation, the petitioner filed a motion for extension of time to file opposition to magistrate's report and recommendation which was ALLOWED (6-9-03), then the petitioner filed a motion to dismiss petition without prejudice on 8-20-03. This motion was granted by judge tauro on 9-8-03 and the case was closed.

Since both habeas petition's were dismissed by request of the petitioner, without prejudice, this instant petition cannot be treated as a "second or successive" petition that has not been authorized by the U.S. Court of Appeals for the 1<sup>st</sup> Cir.

This instant petition is not barred by the one year statute of limitation.

204-11025 JLT

1-28-00 SJC Affirms Conviction (50 days)  
3-17-00 Petitioner Files First Habeas Petition.  
12-27-00 Petitioner Files Rule 30 Motion In Trial Court.  
12-27-00 Petitioner Files Motion To Stay 1<sup>st</sup> Habeas  
Petition To Exhaust State Remedies.  
1-16-01 Petitioner Files Motion To Dismiss 1<sup>st</sup> Habeas  
Petition Without Prejudice.  
2-5-01 Judge Tauro Grants Motion To Dismiss 1<sup>st</sup> Habeas  
Petition Without Prejudice (66 days).  
4-11-01 Trial Court Denies Rule 30 Motion  
4-30-01 Petitioner Files 2<sup>nd</sup> Habeas Petition (20 days).  
8-20-03 Petitioner Files Motion To Dismiss 2<sup>nd</sup> Habeas  
Petition Without Prejudice.  
9-8-03 Judge Tauro Grants Motion To Dismiss 2<sup>nd</sup> Habeas  
Petition Without Prejudice. (82 days).  
11-28-03 Petitioner Files Motion For Required Finding  
In Superior Court.  
1-15-04 Petitioner Motion For Required Finding Denied.  
1-23-04 Notice Of Appeal For Required Finding Motion  
Entered.

3-11-04 Petitioner Files Motion For Leave To Re-File  
Gatekeeper Petition.

3-26-04 Single Justice Grants Motion For Leave To  
Re-File Gatekeeper Petition.

5-6-04 Single Justice Denies Gatekeeper Petition.

5-20-04 Petitioner Files 3rd Habeas Petition

50 days  
82 days  
49 days  
15 days  
66 days  
262 days.

For the reasons stated herein this opposition, the  
Petitioner respectfully moves this Honorable Court to deny  
the respondent's motion to dismiss.

Respectfully Submitted

Mr. Ernest N. Benjamin  
MCI-NORFOLK UNIT 3-3  
Post Office Box 43  
Norfolk, Mass 02056-0043

CERTIFICATE OF SERVICE

I hereby certify that, on June 29, 2004, I caused to  
be served a true and correct copy of the forgoing Opposition  
to the respondent's motion to dismiss by mailing a copy  
of the same by first class mail postage prepaid, and address  
as follows: Eva M. Badway, Assistant Attorney General  
Criminal Bureau, One Ashburton Place, Boston, Mass 02108